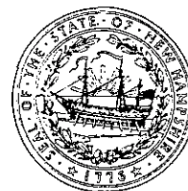




State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



Scott Heimlich
d/b/a Landscapes, Inc.
223 Farrarville Road
Belmont, NH 03220

Re: 32 Howard Road, Gilmanton, NH
Map 27, Lot 51-00

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
No. AF 03-004**

March 26, 2002

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division ("the Division") to Scott Heimlich d/b/a Landscapes, Inc., pursuant to RSA 485-A:29-44 and Env-C 604.02. The Division is proposing that fines totaling \$1,000 be imposed against Scott Heimlich d/b/a Landscapes, Inc. for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division, is a duly constituted administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. Scott Heimlich is an individual doing business as Landscapes, Inc., having a mailing address of 223 Farrarville Road, Belmont, NH 03220.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. RSA 485-A:29-44 authorizes DES to regulate the subdivision of land and the construction, maintenance, and repair/replacement of individual sewage disposal systems ("septic systems"). Pursuant to rulemaking authority conferred therein, the Commissioner of DES has adopted Env-Ws 1000 to implement this program.
2. Pursuant to RSA 485-A:43, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of RSA 485-A: 29-44, including any rule adopted thereunder. Pursuant to this section, the Commissioner has adopted Env-C 604 to establish the schedule of fines for such violations.
3. Env-Ws 1014.11 states the following:

 "(a) Before placing earth backfill over the system, the stone shall be covered with untreated building paper, a 2 inch layer of hay, or filter fabric. An impervious covering such as tar paper shall not be used, as this interferes with ventilation.

- (b) No more than 12 to 18 inches of backfill shall be used to cover the system.
 - (c) Backfill material shall be clean, permeable fill. After backfilling, the top of a new effluent disposal system shall be overfilled with 4 to 6 inches of earth to shed or resist storm water.
 - (d) Machine tamping or hydraulic backfilling of the trench shall be prohibited.”
- 4. On June 24, 2002, DES issued Construction Approval No. CA2002044181A to Stephen D. Mann for a septic system to be located at 32 Howard Road, Gilmanton, NH (“the Property”).
 - 5. In the spring of 2002, Stephen D. Mann contracted with Scott Heimlich, d/b/a Landscapes, Inc., to install the septic system on the Property.
 - 6. Mr. Heimlich installed the septic system at the Property and DES issued a final operational approval on October 1, 2002.
 - 7. On November 18, 2002, Mr. Mann contacted DES to complain that Mr. Heimlich had not covered the system following final inspection.
 - 8. On November 20, 2002, DES contacted Mr. Heimlich to discuss the situation at the Property. Mr. Heimlich stated that Mr. Mann had not paid some of his subcontractors for work performed. DES informed Mr. Heimlich that, even if he had not been paid in full, he was obligated by state law to cover the system. Mr. Heimlich agreed to cover the system within a week.
 - 9. On December 3, 2002, Mr. Mann filed a formal complaint with DES against Mr. Heimlich, stating that Mr. Heimlich had not covered the septic system on the Property, and that Mr. Mann had been forced to contract with another individual to cover the system.
 - 10. Mr. Mann has provided DES with copies of all receipts showing that he had paid Mr. Heimlich \$20,000 to complete his septic system.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

- 1. Scott Heimlich has violated Env-Ws 1014.11 by failing to cover an approved septic system following final inspection. Pursuant to Env-C 604.02(j) the Division is seeking a fine of \$1,000 for this violation.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than April 25, 2003 using the enclosed colored form.

- 1. If Mr. Heimlich would like to have a hearing, please sign the appearance section of the colored form and return it to the DES Legal Unit, as noted on the form. A Notice of Scheduled Hearing will be issued.

2. If Mr. Heimlich chooses to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

3. If Mr. Heimlich wishes to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to the DES Legal Unit **and** call the DES Legal Unit to indicate Mr. Heimlich's interest in settling.

Mr. Heimlich is not required to be represented by an attorney. If chooses to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that Mr. Heimlich committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that Mr. Heimlich committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that Mr. Heimlich proves, by a preponderance of the evidence,** applies in this case:

1. The violation was a one-time or non-continuing violation, **and** Mr. Heimlich did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** Mr. Heimlich did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, Mr. Heimlich was making a good faith effort to comply with the requirement that was violated.
3. Mr. Heimlich has no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to Mr. Heimlich's case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Scott Heimlich, d/b/a Landscapes, Inc., committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is Mr. Heimlich's opportunity to present testimony and evidence that Mr. Heimlich did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If Mr. Heimlich has any evidence, such as photographs, business records or other documents, that believes show that Mr. Heimlich did not commit the violation(s) or that otherwise support Mr. Heimlich's position, Mr. Heimlich should bring the evidence to the hearing. Mr. Heimlich may also bring witnesses (other people) to the hearing to testify on Mr. Heimlich's behalf.

If Mr. Heimlich wishes to have an informal meeting to discuss the issues, Mr. Heimlich must contact the DES Legal Unit at (603) 271-6072 to request a prehearing conference.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.state.nh.us.des). If Mr. Heimlich has any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.

COPY
Harry T. Stewart, P.E., Director
Water Division

CERTIFIED MAIL # 7000 0600 0023 9936 5701

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Mark Harbaugh, DES Legal Unit
Susan Weiss Alexant, DES Hearings and Rules Attorney
Dick deSève, DES, SSB
L. Dugal, Town of Gilmanston Health Officer
Town of Gilmanston Board of Selectmen

*** RETURN THIS PAGE ONLY ***

SCOTT HEIMLICH, D/B/A LANDSCAPES, INC. IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.

PLEASE RESPOND NO LATER THAN April 25, 2003

Please check the appropriate line and fill in the requested information below.

APPEARANCE On behalf of Scott Heimlich

___ I request to have a **formal hearing** scheduled in this matter.

___ I request to have a **prehearing conference** scheduled in this matter.

___ I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of Scott Heimlich,

___ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$1,000.00 paid to "Treasurer, State of New Hampshire" is enclosed.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY TO:

**Department of Environmental Services Legal Unit
Michael Sclafani, Legal Assistant
6 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095**

** If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*